IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 15438/11

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD Plaintiff

and

ABDURAOUF DAWOOD Defendant

And 7 similar cases under Case Nos
18083/11; 18554/11; 18555/11; 18558/11;
19383/11; 19714/11 & 25264/11

Court:	GRIESEL, DLODLO & LE GRANGE JJ
Heard:	20 April 2012
Delivered:	9 May 2012

JUDGMENT

GRIESEL J:

Introduction

[1] In all eight matters presently before the court the plaintiff, Standard Bank of South Africa Limited, applies for default judgment, based on mortgage bonds registered over immovable properties which constitute the homes of the respective defendants. In each claim, the plaintiff claims payment of the full outstanding balance due under the bond, together with interest and costs, as well as an ancillary order that the property hypothecated be declared executable. It is common cause that the provisions of the National Credit Act, No 34 of 2005 ('the NCA'), are applicable to the individual claims.

[2] There has been a proliferation of decisions in the recent past arising from the provisions of the NCA, especially insofar as home loans are concerned. This has given rise to different and divergent rules of practice or practice directions that have been issued in various Divisions of the High Court.[1] This hearing of the full court has been convened in an attempt to clarify or resolve certain points of uncertainty concerning the correct practice to be followed in this Division in these matters in the light of certain reservations expressed by the presiding Judges in motion court when these matters were first called (on 7 and 16 March 2012, before Gamble J and Baartman J respectively) when, by arrangement with the Judge President, they were postponed for hearing before a full court.

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[1] See eg Erasmus *Superior Court Practice* (loose-leaf service 38, 2012) at B1-124–124B, where some of the different practice notes are referred to. See also *Standard Bank of South Africa Limited v Bekker & another and four similar cases* 2011 (6) SA 111 (WCC) paras 3, 11.

[3] The questions addressed to us regarding the present matters may be formulated as follows:

(a) Whether a simple or a combined summons ought to be used in actions based on mortgage loans in respect of residential property where it is sought, *inter alia*, to have such property declared executable;

(b) Whether the notice to defendants required by the SCA in *Standard Bank v Saunderson* [2] ('the *Saunderson* notice') ought to be amplified so as to include a reference to s 26(3) of the Constitution;

(c) Whether or not a plaintiff, in applications for default judgment involving a prayer for execution against residential property, should be required to set out 'relevant circumstances' contemplated in *Gundwana v Steko Development*[3] and the proviso to Uniform Rule 46(1)(a)(as amended) by way of an affidavit.[4]

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[2] 2006 (2) SA 264 (SCA) paras 25 and 27. This requires that a summons seeking an order for execution against immovable property must inform the defendant as follows:

> 'The defendant's attention is drawn to Section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that an order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court.'

[3] 2011 (3) SA 608 (CC).

[4] Rule 46(1) was amended with effect from 24 December 2010 in terms of GN R981 of 19 November 2010 and now provides:

> '(1) (a) No writ of execution against the immovable property of any judgment debtor shall issue until –
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> (i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or

[4] At the hearing of the matters before us Mr *Sievers* appeared on behalf of the Bank in all eight matters, while Ms *Davis* appeared as *amicus curiae*. The court is indebted to both counsel for their very full and helpful arguments, which were of great assistance to us.

(a) Simple or combined summons

[5] The first question arises from views expressed by Gamble J in *Absa Bank v RD Marshall & others*; *Absa Bank v PJ Uys & another*,[5] to the effect that it is preferable to make use of a combined summons, instead of a simple summons, in matters of this kind.

[6] The rules as they stand make provision for different ways in which proceedings may be commenced in the High Court. Rule 17(2) deals with the use of simple and combined summonses. [6] The rule draws a distinction between claims for a debt or liquidated demand, on the one hand, where the use of a simple summons is required, and all other claims (i.e., claims which are 'not for a debt or liquidated demand'), where a combined summons is required. Whereas the use of a combined summons requires that a statement of the material facts relied upon by the plaintiff (particulars of claim) be annexed to the summons, Form 9

(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue *unless the court, having considered all relevant circumstances, orders execution against such property.*'(Emphasis added)

[5] (8850/2011, 11921/2011) [2011] ZAWCHC 500 (29 November 2011) paras 30–31.

[6] Rule 17(2) reads as follows:

'(a) In every case where the claim is not for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 10 of the First Schedule, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of his claim, which statement shall inter alia comply with rule 18.

(b) In every case where the claim is for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 9 of the First Schedule.'

requires only that the plaintiff's cause of action be set out 'in concise terms'. In addition to the simple and combined summonses of rule 17, rule 8 provides for a provisional sentence summons where the action is based on a liquid document.[7]

[7] It is settled law and practice that, in setting out the cause of action in a simple summons, a plaintiff 'need not go into detail and set out the particulars of the basis of the plaintiff's claim, that being a matter for the declaration. The summons merely puts a label to the claim, and need not state the claim with great particularity. . . It is not necessary to include in the summons a detailed statement of all the essential averments required for a statement so complete as not to be excipiable.'[8] However, it is not irregular to supply in a simple summons the particularity required in a combined summons. It may even be advisable to do so, if the intention is to apply for summary judgment, because the more particular the summons the greater the particularity required from the defendant.[9]

[8] Nowadays, however, the simple summons can no longer be regarded as merely 'a label to the claim', at least not in claims where the NCA is applicable. This is so, as rightly observed by Gamble J, due to 'the myriad allegations which a plaintiff is now required to make regarding NCA compliance where the statute is applicable and com-

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[7] Rule 8(1), read with Form 3.
[8] AC Cilliers *et al* Herbstein & Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed) Vol. 1 479 (footnotes omitted) (hereafter 'Herbstein & Van Winsen'). See also *Volkskas Bank Limited v Wilkinson and three similar cases* 1992 (2) SA 388 (C) at 397C–H.
[9] LTC Harms *Civil Procedure in the Superior Courts* (Service Issue 44, Sep 2011) para B17.6.

pliance with the constitutional imperatives prescribed by s 26(1) of the Constitution'.[10] To summarise some of the necessary allegations:

(a) The summons must contain the *Saunderson* notice quoted above.[11]

(b) In terms of Western Cape Consolidated Practice Note 33(1),[12] following the judgment of the SCA in *Rossouw v Firstrand Bank Limited*,[13] the summons must contain sufficient allegations or averments to enable the court to be satisfied that the procedures required by ss 127, 129 or 131 of the NCA, read with s 130(1) and (2) of the NCA as may be applicable to the claim, had been complied with before the institution of the proceedings.[14]

(c) The proviso to rule 46(1)(a), quoted above, as well as the Constitutional Court's judgment in *Gundwana*, requires the court to consider 'all relevant circumstances' before declaring a property executable which is the primary residence of the 'judgment debtor' (or the defendant, as the case may be). Some of the relevant circumstances that must be averred in the summons, as

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[10] *Marshall, supra,* para 30.

[11] Footnote 2 above.

[12] Practice Note 33(1) (as amended) reads as follows:

'In any proceedings instituted in terms of the National Credit Act 34 of 2005 (the Act) in respect of any claim to which the provisions of sections 127, 129 or 131 of the Act apply, the summons or particulars of claim, or, in motion proceedings, the founding papers, must contain sufficient allegations or averments to enable the court to be satisfied that the procedures required by those sections, read with s 130(1) and (2) of the Act, as may be applicable to the claim had been complied with before the institution of the proceedings. (The attention of practitioners are *(sic)* drawn to the judgment in *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA), in particular at paras 33–37.)'

[13] 2010 (6) SA 439 (SCA) paras 34, 53–54.

[14] In addition, in terms of Practice Note 33(2), an affidavit verifying these facts must be filed at the hearing of the application for default judgment.

required in terms of the decision of the full court in *Bekker's* case, *supra,* are –

(i) whether or not the immovable property in question is the primary residence of the defendant / judgment debtor;[15]

(ii) the amount of the instalments payable in terms of the mortgage bond and the amount in which payment in terms of such instalments was in arrears at the time of foreclosure or the issue of summons.[16]

A host of further 'relevant circumstances' which the court may have to consider appear from the judgment of the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stolz,*[17] and the North Gauteng full court in *FirstRand Bank Ltd v Folscher & another, and similar matters.*[18]

(d) In terms of Blignault J's judgment in *Nedbank Limited v Jessa & another; and two similar matters* ('*Jessa*'),[19] the summons must, in addition to the *Saunderson* notice, include an appropriate notification to the defendant that he or she is entitled to place information regarding relevant circumstances within the meaning of s 26(3) of the Constitution and rule 46(1) before the court hearing the matter. (This ruling forms the subject matter of the

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[15] Para 27.
[16] Para 29.
[17] 2005 (2) SA 140 (CC) paras 56–60.
[18] 2011 (4) SA 314 (GNP) paras 41, 54. See also *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (GNP) para 33.
[19] (6656/2011, 15274/11 and 15388/2011) [2011] ZAWCHC 495 (20 December 2011), para 12.

second question addressed to us and will be considered in more detail below.)

[9] The need to incorporate all these allegations in the summons and to annex the relevant documentation relating thereto led Gamble J to conclude that it will of necessity lead to the summons 'losing it conciseness'. The simple summons used by the plaintiffs in the matters before him was 'essentially a hybrid document', akin to a combined summons, setting out the plaintiff's cause of action in ten individually numbered paragraphs and attaching seven individual documents. The combination of these facts persuaded the learned judge that it would be 'preferable to make use of a combined summons' instead of a simple summons in matters of this kind.[20]

[10] Gamble J remarked,[21] and counsel before us accepted, that the language of rule 17(2) is peremptory, with the result that litigants are given no choice as to which form of summons to use. In coming to the conclusion that a combined summons is appropriate in such cases notwithstanding the provisions of rule 17(2)(a) Gamble J reasoned as follows:

'But what of that peremptory language of Rules 17(2)(a) and (b) which oblige a plaintiff to use a simple summons for recovery of a debt or liquidated sum and a combined [summons] for other cases? In the first place, one must have regard to the fact that the current rules of practice predated both the NCA and the constitutional era. It may therefore be necessary for the Rules Board to reconsider the position in the light of prevailing commercial practices and realities.

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[20] *Marshall*, para 31.
[21] paras 11 and 32.

However, I am of the view that a purposive interpretation of Rule 17(2)(a) will not preclude a plaintiff from commencing action for recovery of a debt by using a combined summons. The provisions of the NCA and Section 26 of the Constitution are aimed at offering additional protection to debtors, and if the rule is interpreted against that setting, it seems to me that the necessity to amplify the allegations setting out the cause of action and the incorporation of relevant documentation takes the claim outside the dichotomous characterisation of claims in terms of Rule 17(2) and requires a *sui generis* approach. The effect is that a combined summons is appropriate in such cases notwithstanding the provisions of Rule 17(2)(a).' [22]

[11] I have no quarrel with the purposive interpretation of rule 17(2) adopted by my colleague, especially when one has regard to the purpose of the rules, as succinctly summarised in *Herbstein & Van Winsen*:[23]

'The Rules of Court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts. Consequently, they will be interpreted and applied in a spirit that will facilitate the work of the courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible.'

[12] As for the perceived 'peremptory' nature of rule 17(2), however, my impression is that our courts have in the past taken a less dogmatic view in not insisting on strict compliance with the provisions of the rule. Thus, for example, the court has condoned the use of a simple summons in the case of a claim for unliquidated damages.[24] The courts have even allowed the use of motion proceedings in respect of debts or liquidated demands (where no disputes of fact were anticipated).[25] This reaffirms

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[22] Paras 32–33.
[23] Herbstein & Van Winsen, Vol. 1 30 (footnotes omitted).
[24] *Krugel v Minister of Police* 1981 (1) SA 765 (T) at 768H.
[25] See eg *Engar v Omar Salem Essa Trust* 1970 (1) SA 77 (N) at 78D–F; Herbstein & Van Winsen Vol 1 295 n 48 and the authorities referred to therein.

the old adage, namely that the rules are made for the courts, not the courts for the rules.[26]

[13] It is, furthermore, a well-settled principle of interpretation that the use of the word 'shall' in legislation, although generally peremptory, can also be directory.[27] Thus, in *Sutter v Scheepers*, *supra*, the court summarised some of the rules of interpretation that may be applied when determining whether a particular provision was to be regarded as peremptory or directory. The second rule of interpretation thus laid down gives a clue as to the true meaning of the word 'shall' (Afr. '*moet*') in rule 17(2):

'If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.'[28]

[14] In my view, this principle also applies to the interpretation of rule 17(2). I accordingly agree with Gamble J that it is not impermissible or irregular to use a combined summons in matters of this kind. It may well be preferable in certain instances to make use of a combined summons – as has already been done in many cases in this Division. This would, generally, make for neater and more elegant pleading and would at the same time make the plaintiff's case more easily readable and comprehensible, not only to the defendant, but also to the court. Having said that, however, for the reasons that follow, I am not prepared to require –

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[26] See eg *Republikeinse Publikasies v Afrikaanse Pers Publikasies* 1972 (1) SA 773 (A) at 783A–B; *Chelsea Estates & Contractors CC v Speed-o-Rama* 1993 (1) SA 198 (SE) at 201G; Erasmus *op cit* B1-5; Harms *op cit* A2.3.

[27] See *Sutter v Scheepers* 1932 AD 165 at 173–174; *R v Rajah* 1955 (3) SA 276 (A) at 280F–281F; Claassen *Dictionary of Legal Words and Phrases* Vol 4 S-47–48 (loose-leaf issue 9) *s v 'shall'*.

[28] *Loc cit.*

as an absolute rule of practice – that a combined summons invariably be used in matters of this kind.

[15] First, such a rule of practice would fly in the face of the clear wording of rule 17(2)(b) and, as such, would impermissibly usurp the function of the Rules Board for Courts of Law.[29] If the procedure laid down in rule 17 is to be changed, the interests of the administration of justice would be better served by a thorough consideration of the matter by the Rules Board in a uniform and holistic manner, resulting in a uniform rule binding in all divisions, instead of the piecemeal process of judicial tinkering that is presently taking place all over the country, which has already resulted in the undesirable situation where divergent views and practices abound, creating uncertainty for litigants and practitioners alike.[30]

[16] Secondly, the mere fact that a summons may have to contain a number of paragraphs and may have several relevant documents annexed thereto does not mean that the use of a simple summons would be inappropriate. By way of example, reference could be made to the lengthy and detailed allegations made in two of the simple summonses quoted in *Wilkinson's* case, *supra*,[31] where Berman and Selikowitz JJ – in their day two of the most accomplished exponents of motion court practice in this Division – did not bat an eyelid at the form of the somewhat prolix summonses before them. In any event, as pointed out by the *amicus* in

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[29] Rules Board for Courts of Law Act 107 of 1985, s 6(1)
[30] See the remarks in para [2] above and in *Bekker, supra,* para 11.
[31] Footnote 8 above at 391H–393F.

her argument, it is not the summons that is required to be concise; it is the plaintiff's cause of action that must be set out 'in concise terms'.

[17] Thirdly, I am not convinced that the use of a simple summons is an obstacle to compliance by a plaintiff with the duties resting on it in matters of this kind regarding necessary allegations to be made. As demonstrated by the authors of *Erasmus*,[32] this may be accomplished without too much difficulty and should, as a matter of practice, be followed in this Division in future. [33]

[18] Finally, there are also certain costs implications in using a combined summons instead of a simple summons. At the hearing before us, we requested counsel for the plaintiff to furnish us with a pro forma bill of costs, comparing the costs recoverable in respect of a simple summons, on the one hand, and a combined summons, on the other. The exercise shows that the drafting of a simple summons of four to five pages prepared by an attorney at R213.00 per page will cost between R852.00 and R1 065.00. Where a combined summons and particulars of claim are prepared by an attorney certified to appear in the High Court, the total cost would escalate to between R1 448 and R2 300, i.e. an increase of between 70% and 115%. Were an advocate to be briefed to draft the particulars of claim, the costs would be substantially higher. This demonstrates that proceeding by way of combined summons will

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[32] *Op cit* B1 – 124 to B1 – 125. See also para [37] below.
[33] See para [37] below.

significantly increase the cost of debt recovery, which will ultimately redound to the prejudice of consumers by driving up the cost of credit.[34]

[19] To sum up as far as this aspect is concerned, for the reasons stated above, we decline to approve the practice suggested in *Marshall* that a combined summons be used in preference to a simple summons in matters involving the NCA and execution orders contemplated in rule 46(1). We hold, nonetheless, that use of a combined summons will not be regarded as impermissible or irregular in these matters, provided that the costs recoverable by a plaintiff on taxation may well be limited to the costs of a simple summons.

(b) Should the *Saunderson* notice be amplified so as to include a reference to section 26(3) of the Constitution?

[20] Inasmuch as both the second and third questions have recently been dealt with by courts in this Division in considered judgments, it is not quite clear why these questions have again been submitted to this court. Both matters can therefore be disposed of briefly. The second question flows from the amendment to rule 46(1) and the judgment of the Constitutional Court in *Gundwana, supra*, referred to earlier. Pursuant to that decision and the amendment of the rule, the position is now that applications for default judgment in which the plaintiff seeks an order declaring executable residential immovable property which may be the home of the judgment debtor (or defendant) has to be set down for

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[34] See the remarks of Peter AJ in *Nedbank Limited v Fraser & another and four other cases* 2011 (4) SA 363 (GSJ) para 45.

hearing by a court, not the registrar, which is required to consider 'all relevant circumstances' before granting an execution order.

[21] As observed by the full court in *Bekker*,[35] the distinction between s 26(1) and s 26(3) rights was fundamental to the decision in *Saunderson* because, if execution orders impeded both s 26(3) and s 26(1) rights, the argument that the registrar could authorise execution could not be sustained by virtue of the clear provisions of s 26(3) of the Constitution.

[22] Following this decision, a rule of practice was laid down by Blignault J in *Jessa, supra*,[36] that the contents of the *Saunderson* notice should be amplified to include an appropriate notification to the defendant that 'he [or she] is entitled to place information regarding relevant circumstances within the meaning of s 26(3) of the Constitution and rule 46(1), before the Court hearing the matter'.

[23] Both counsel appearing before us supported Blignault J's ruling and so do the learned authors of *Erasmus* in the draft notice proposed by them.[37] In our view, there is no reason for us to deviate from the course already adopted and outlined by our colleagues in the *Bekker* and *Jessa* cases and, as stated above, we endorse the suggested practice.

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[35] *Bekker, supra,* para 12.
[36] In para 12 of the judgment.
[37] Footnote 32 above, *loc cit.*

(C) Should an affidavit be filed setting out relevant circumstances in terms of rule 46(1) in support of an application for default judgment?

[24] As has been noted above, there is a host of relevant factors that may have to be considered before an order declaring immovable property executable is issued. However, the present enquiry is concerned, not so much with which factors are to be considered, as with the way in which those factors are to be placed before the court.

[25] In *Nedbank v Mortinson*,[38] the full court in the WLD laid down rules of practice requiring certain facts to be placed before the court by way of an affidavit by a creditor, which affidavit is to be filed simultaneously with the application for default judgment. This was followed and expanded upon by a full court in North Gauteng in the *Folscher* matter.[39]

[26] In *Bekker, supra*, however, a full court in this Division declined to endorse the practice sanctioned by the court in *Folscher* (and, by necessary implication, also in *Mortinson*). It emphasised that –

'(i)t is desirable that the court should be able to know *from the summons* whether or not the application for an order authorising execution against immovable property concerns property that is the defendant/judgment debtor's primary residence. An appropriate allegation should therefore henceforth be included *in the summons* in matters in which a declaration of special executability is sought ancillary to judgment on the money claim. In matters in which the plaintiff is unable to make such an allegation positively because of a lack of knowledge of the relevant facts that much

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[38] 2005 (2) SA 462 (W) para 33.1.
[39] Footnote 18 above, paras 43, 54.

should be stated in the summons. In cases in which the summons does not contain an allegation that the affected property is not the primary residence of the defendant the court will scrutinise the matter assuming that the property may be the defendant's primary residence unless it is clear from other indications in the papers that this is not so. We agree with the contention advanced both by counsel for the plaintiff and by the amicus that it is in general undesirable that these issues be dealt with by the introduction of affidavits in the manner required by the practice note issued in the North Gauteng High Court in terms of para 54 of the judgment in *Folscher*.' [40]
(Emphasis added)

[27] This latter view found support in *Jessa*, *supra*, where Blignault J went further and held that '(i)f it is intended to place additional facts regarding relevant circumstances before the court, they should be alleged in plaintiff's summons and served on the defendant'.[41]

[28] Again, both counsel before us supported this reasoning. We are, of course, bound by the reasoning of the full court in *Bekker*, unless satisfied that it is clearly wrong. Suffice it to say that no reasons have been advanced for us to differ from the views expressed in this regard in the *Bekker* and *Jessa* cases. Having said that, I wish to add two observations: first, where a court dealing with an application to declare immovable property executable requires further information relating to any relevant circumstances that have not been specifically mentioned in the summons, it will be necessary and unavoidable to place such further information before the court by way of an affidavit by the creditor. In those circumstances, the court will, of course, be astute to protect the rights of the defendant.

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[40] Para 27 at 127F–G.
[41] Para 17.

[29] Secondly, I have noted Blignault J's remarks in *Jessa* that it offends against the *audi alteram partem* rule and the right to a fair hearing to grant default judgment on the strength of allegations contained in affidavits which have not been served on defendants and to which they have not had an opportunity to respond. [42] I have reservations as to the correctness of these views. In my view, a litigant who is in wilful default cannot be heard to complain that his or her fair trial rights have been infringed by a court deciding a case against them in their absence. However, in the absence of full argument of the matter, I do not find it necessary, for purposes of this judgment, to express any final opinion in this regard.

Individual cases

[30] This brings me finally to the individual cases before us. Each of the claims before us has been commenced by way of a simple summons. Each claim is for the outstanding balance due and owing under a mortgage bond, a copy of which is attached to the summons, which amount is due by reason of the defendants' failure to pay the instalments punctually. Mention is also made in each summons of the fact that the property hypothecated is to be 'regarded as the defendant's home'.

[31] Reference is further made in the summons to the plaintiff's compliance with the provisions of ss 129 and 130 (and also, where applicable, s 86(10)) of the NCA and an affidavit has been furnished by a manager of the plaintiff detailing and proving compliance with the provisions of s 129 of the NCA. The summons complies with the practice

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[42] In paras 15–16.

directive in *Saunderson*. Details regarding the amount of arrears, together with the monthly instalment, are also furnished in each case.

[32] Save for the matter of *Cedras*, specifically mentioned below, I am accordingly satisfied a proper case has been made out for the grant of default judgment in the remaining matters, including an order that the property be declared executable for the judgment debt. Default judgment will accordingly be granted in those matters in terms of the draft orders presented to us, which follow the prayers in the summons. In respect of all those matters, the costs will exclude the costs incurred in respect of the hearing before us on 20 April 2012, in respect of which each party will pay their own costs.

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[33] In this matter, the plaintiff's claim is for payment of R54 507.08, i.e. a claim falling well within the jurisdiction of the magistrate's court. In the light of the defendants' default, I am satisfied that a proper case for judgment in this amount has been made out, subject to the costs being taxed on the applicable magistrate's court scale. I am not satisfied, however, that an order declaring the property to be executable is justified in the circumstances. As stated by the Constitutional Court in *Jaftha's* case, *supra,*[43] '. . . the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor.'

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[43] Para 57.

[34] Further relevant factors referred to in *Jaftha* include 'the availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home'.[44] The court also stressed that execution against the property should not be ordered where ordering the sale of the defendants' home would be 'grossly disproportionate'.[45]

[35] On the facts of this case, it appears to me that, to grant an order declaring the defendants' home to be executable for such a paltry amount would be disproportionate in the circumstances. Moreover, no reason has been advanced why the plaintiff cannot effectively utilise the debt-collecting mechanisms in terms of the Magistrates' Courts Act and rules to obtain payment of the debt. Should these alternative measures prove ineffective or unsuccessful, the plaintiff can, of course, at a subsequent stage approach this court anew, on proper notice to the defendant,[46] seeking an order that the property be declared executable.

Conclusion

[36] For the reasons set out above, default judgment is granted in all the matters placed before us in accordance with the draft orders presented to us. In respect of all those matters, the costs will exclude the costs incurred in respect of the hearing before us on 20 April 2012, in respect of which each party will pay their own costs.

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[44] Para 59.
[45] Para 56.
[46] Cf *Absa Bank Ltd v Xonti* 2006 (5) SA 289 (C) at 290C–H.

[37] It is further directed, as a rule of practice in this Division in all matters issued subsequent to the date of this judgment, that the summons should contain a notice to the following effect, as suggested in *Erasmus*:[47]

'Take notice that:

(a) your attention is drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996, which accords to everyone the right to have access to adequate housing. Should you claim that the order for execution will infringe that right it is incumbent on you to place information supporting that claim before the court;

(b) in terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances;

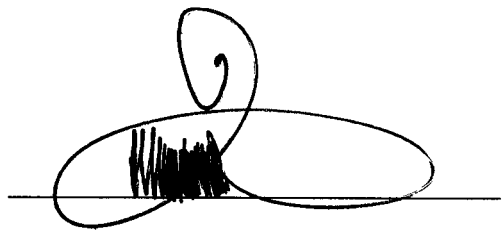
(c) in terms of rule 46(1)(a)(ii) of the Rules of the High Courts of South Africa, no writ of execution shall issue against your primary residence (ie your home), unless the court, having considered all the relevant circumstances, orders execution against such property;

(d) if you object to your home being declared executable, you are hereby called upon to place facts and submissions before the court to enable the court to consider them in terms of rule 46(1)(a)(ii) of the Rules of Court. Your failure to do so may result in an order declaring your home specially executable being granted, consequent upon which your home may be sold in execution.'

B M GRIESEL
Judge of the High Court

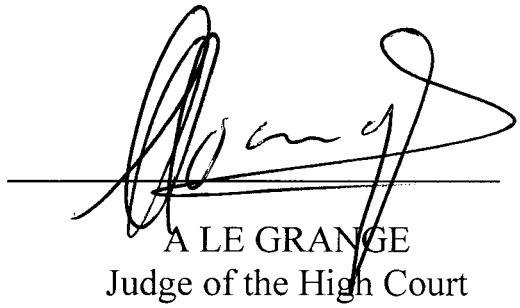
[47] *Op cit,* at p B1–124 to B1–125.

DLODLO J: I agree.



D V DLODLO
Judge of the High Court

LE GRANGE J: I agree.



A LE GRANGE
Judge of the High Court